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Supreme Court, U.S.
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No. 02-53

IN THE

Supreme Court of the United States

LEATRICE ELLEN CARICOFE and RICHARD A. CARICOFE, as Personal Representatives of the Estate of Neil Allen Caricofe,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF OCEAN CITY, MARYLAND, ROLAND F. POWELL, Mayor; DAVID MASSEY, Chief; ERIC ALBAN, Officer; KATHLEEN BRAEUNINGER, Sergeant; JENNIFER ENGSTROM, Officer; JAMES GRADY, Officer; FREDDIE HOWARD, Officer; MATTHEW JONES, Officer; EDWARD SCHMITT, Officer; MONICA SKARPAC, Officer; RONNIE TOWNSEND, Officer; JOHN WHITTINGTON, Sergeant; EDMOND O'BRIEN, Sergeant; and OCEAN CITY POLICE DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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The respondents respectfully request the Court to deny the petition for writ of certiorari for the reasons set forth herein.

The United States District Court for the District of Maryland was correct in granting summary judgment in favor of the police respondents on the issue of qualified immunity and the United States Court of Appeals for the Fourth Circuit was correct in affirming that decision because, under the facts of the case, the officers' use of force was objectively reasonable. The force used was in increments, consistent with the decedent's failure to comply with reasonable orders, and commencing with verbal commands, followed by the use of pepper spray, and finally by the use of batons when the decedent's conduct posed a threat of imminent serious injuries to the officers and to others.

The respondent officers were confronted with a large (6'3" tall, weighing 262 lbs.) individual (who they later learned was a professional wrestler) who failed to comply with their verbal commands for him to lie on the floor so that the officers could take him into custody. At first refusing to do so, the decedent, at one point in time, did kneel and the officers were able to place one handcuff on each of his wrists, but before they were able to bring the cuffs completely behind the decedent's back, he physically threw both of the officers off his body and, at this point, was flailing his arms with open cuffs on each of his wrists in the direction of the officers, posing a clear and imminent danger of serious injury to the officers.

It was then that the officers escalated their use of force to the next level, that is, the use of pepper spray, but which had no effect on the decedent's conduct. Utilizing the next

level of force, the officers used their batons to strike the decedent in non-lethal areas of his body. Petitioners argue (Pet. App. 8) that their expert, Dr. Dix, opined that the wound to the top of the decedent's head was consistent with the decedent having been struck with an object, and then point to the statement of their other expert, Dr. Fyfe (Pet. App. 9), that the striking of the decedent in the head with an object would have been in violation of general accepted police standards. However, petitioners overlook the fact that there was no evidence that the officers struck the decedent in the head and the autopsy report reflected only abrasions and cuts but, more importantly, there was no indication that the wound to the head was lethal or represented the application of deadly force. In addition, the head wound was equally consistent with the decedent's action in striking his head against a vending machine.

Petitioners cite *Hope v. Pelzer*, 122 S. Ct. 2508 (2002), as authority for the non-applicability of qualified immunity at the summary judgment stage of a 42 U.S.C. § 1983 case. *Hope* involved the handcuffing of a prisoner to a hitching post. Consequently, it did not involve the Fourth Amendment but rather the Eighth and Fourteenth Amendments to the United States Constitution. In addition to that distinction, the Court noted that in light of binding Eleventh Circuit precedent (and an Alabama Department of Corrections Regulation regarding the use of a hitching post), a reasonable police officer would have known that to engage in that act would have been a clear violation of the prisoner's rights.

Petitioners also assert that the Ninth Circuit Case of *Deorle v. Rutherford*, 272 F.3d 1272 (2001), is in conflict with Fourth Circuit precedent. A reading of *Deorle*, however, reveals that petitioners' argument is misplaced.

Deorle dealt with an officer's use of a lead-filled beanbag and shooting the beanbag into the face of a suspect causing serious injury. However, in *Deorle*, the plaintiff was unarmed, had not attacked or touched anyone, had obeyed the instructions given to him by the officers, and was not warned that he would be shot if he physically crossed an undisclosed line arbitrarily selected by the officer. In addition, Deorle was physically compliant with all of the officer's instructions. In the instant case, the decedent was not compliant and, at one point in time, had one of the officers pinned against a door holding him by the front of his shirt. Likewise, in *Deorle*, and contrary to the instant case, Deorle posed no threat to the officer and, indeed, the officer had already predetermined that he would shoot Deorle if Deorle came within a certain range and did, in fact, shoot him having made a calculated and deliberate decision to shoot when Deorle reached the particular point the officer had designated in his own mind. The decision in *Deorle* is not inconsistent with the objective use of reasonable force in the circumstances of the instant case.

In short, the use of force in the instant case by the officer respondents was consistent with and not in violation of the Fourth Amendment or of the decision of this Court as set forth in *Grahm v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

Having determined that there was no constitutional violation and that the officers were entitled to qualified immunity, then the City, Mayor, Police Chief and police department as the employer and policymakers of the officers, cannot be held liable. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).

CONCLUSION

Applying the applicable principles of law to the facts of this case, the officers' conduct was objectively reasonable, and a reasonable police officer could have believed that such actions were justifiably permissible. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The officers were confronted with bizarre and unusual behavior with a person of unusual size and strength who could not be controlled either physically, through the use of pepper spray or even by the use of batons. They were confronted with an individual who had an open, dangling handcuff on each wrist and was swinging his arms about in an aggressive manner toward the officers causing them to be placed in imminent danger of serious injury. Once the decedent was subdued, no other force was used.

For all of the above reasons, respondents respectfully request that the writ be denied.

Respectfully submitted,

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